SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 191.

ISAAC H. HARRIS, PLAINTIFF IN ERROR,

v.

B. BALK.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

It appears to be necessary to restate briefly the facts in the case. Both the plaintiff in error, Isaac H. Harris, and the defendant, B. Balk, were residents of the State of North Carolina. Jacob Epstein was a resident of the city of Baltimore, State of Maryland. During June and July, 1896, B. Balk loaned Isaac H. Harris several sums of money aggregating one hundred and eighty dollars ($180), which Harris verbally promised to repay; but there was no written evidence of the obligation. The indebtedness was to be paid in the State of North Carolina. At the same time Jacob Epstein, a wholesale merchant in Baltimore, contended that B. Balk was indebted to him and in the amount of about three hundred dollars ($300).

About August, 1896, Isaac H. Harris visited Baltimore

for the purpose of purchasing merchandise, and while in that city temporarily—that is to say, on August 6, 1896—Jacob Epstein attempted to institute suit against B. Balk as a non-resident of Baltimore and to garnishee said Isaac H. Harris on the said day. Said Harris did not possess at the time any of the identical money which he had borrowed from said Balk. On the following day, August 7, 1896, said Harris left Baltimore on his return to his home in Washington, North Carolina. Said Harris did not employ any lawyer to represent him in the garnishee proceeding instituted against him and did not contest the garnishee process, although the record of the Maryland judgment purports to show that one W. N. Ewing, without authority, attempted to enter up a confession for said Harris. (See Record, page 13.) After the return of Harris to his home in North Carolina he made an affidavit on August 11, 1896, that he owed Balk one hundred and eighty dollars, and stated that the amount had been attached by Jacob Epstein, of Baltimore, and presumably forwarded this affidavit to Baltimore. (See Record, page 13.) Said Harris admitted the above-stated facts. (See Record, page 17.) On the same day that said Harris made the voluntary affidavit of indebtedness to said Balk, said Balk instituted suit against Isaac H. Harris, before a justice of the peace in North Carolina, by the issuing of a summons which was duly served on said Harris on the same day. After this date the said Harris paid to C. F. Warren, an attorney of Jacob Epstein residing in North Carolina, the said sum of one hundred and eighty dollars. The date of this payment is not stated, but presumably it was not paid until after the entry of the garnishee judgment in the Maryland court, which must have been made some days after the forwarding of the affidavit.

No execution was issued upon the alleged garnishee judgment in the Maryland courts. Said Harris contends that he was compelled to pay said judgment by reason of the fear

that certain goods which he had purchased from wholesale merchants in Baltimore would be seized under execution. This contention must necessarily be a fiction, because said Harris had no property in the merchandise so purchased before delivery, and they could not have been attached in the hands of the common carrier after delivery to the latter and bill of lading issued for transportation from Baltimore into another State. It is not contended that said Harris had any other property in Maryland. The payment was entirely voluntary.

It is not necessary to refer in detail to the several trials in the courts of North Carolina before the justice of the peace by appeal in the superior court and the hearing of the several appeals in the supreme court of North Carolina.

It is apparent there has been collusion between Jacob Epstein and the plaintiff in error, Isaac H. Harris, since the inception of the attempted garnishee proceeding in Maryland. It is only necessary to point out the visit of said Harris to Baltimore at the opportune time, the unauthorized appearance of attorney W. N. Ewing, the voluntary furnishing of the affidavit admitting the indebtedness to Balk made after he had returned to North Carolina, the payment of the money by Harris to the attorney of Epstein in North Carolina and the appearance of the same attorney for said Harris in the courts of North Carolina in the suit of Balk *vs.* Harris, the appearance in the same action for Harris of the same attorney in Baltimore who represented Epstein in the garnishee proceeding, and the apparent disclosure in the record of the fact that said Epstein had been in reality defending for Harris the suit instituted against him by Balk. It is true that Harris attempted to deny this collusion, but the mere denial cannot avail against the above facts and others apparent in the record.

ARGUMENT.

The plaintiff in error pleaded in bar of the suit brought by the defendant in error the Maryland judgment and contended that it was conclusive against the defendant in error in this action. He further contends that the said judgment was a valid judgment in Maryland and was therefore entitled to full faith and credit in the courts of North Carolina. If the Maryland court had and exercised jurisdiction of Balk and the garnishee Harris and also of the *res*, these contentions would be correct.

On the other hand, the defendant in error contends that the Maryland court, in the garnishment proceeding of Jacob Epstein *v.* Balk and the garnishee, Harris, was without jurisdiction, and that the said judgment could be collaterally attacked in the courts of North Carolina.

The jurisdiction of the Maryland court may be attacked in this action, and even to the extent of contradicting the recital contained in the record.

Thompson *v.* Whitman, 18 Wallace, 457.
Knowles *v.* Gaslight & Coke Co., 19 Wallace, 58.
Kilbourn *v.* Thompson, 103 U. S., 198.
Noble *v.* Union River Logging R. R., 147 U. S., 173.
Greenleaf on Evidence (Lewis edition), vol. 1, sec. 548.

If Balk had no property within the State of Maryland, the Maryland court was without jurisdiction.

Pennoyer *v.* Neff, 95 U. S., 714.

Facts essential to establish the jurisdiction of the State court must appear affirmatively by allegation or affidavit before the process of the court can issue authorizing the attachment or garnishment of the *res*. This is true even if such essential fact is subsequently disclosed during the pendency of the action. This is also true, although the statute

of the State may not require such jurisdictional fact to be alleged as a prerequisite to the issuing of the writ of condemnation. It does not appear in the affidavit made by Epstein in the Maryland court that any allegation was made that Balk owned property within the State of Maryland. (See Record, p. 11.)

While the debtor (the defendant) and the garnishee are both non-residents, no garnishment process can issue against such non-resident temporarily in the State at the instance of a plaintiff domiciled in the State.

A non-resident cannot be held as garnishee.

Rood on Garnishment, p. 21, note 5, sec. 15.

One who is only temporarily in a State and in which he does not reside cannot be subjected to garnishment.

Waples on Attachment and Garnishment, 227–228.

Drake on Attachment, 5th ed., secs. 474–476.

Everett *v.* Connecticut, &c., Co., 4 Colo. App., 513; 36 Pac., 617.

The majority of the decisions hold that where personal jurisdiction cannot be acquired over the defendant on account of his being a non-resident the plaintiff cannot garnishee a non-resident while temporarily within the State.

Am. & Eng. Enc. of Law, second edition, vol. 14, p. 803, and the decisions cited in note 2 on said page.

It has been held that a citizen of Maine, having his home and domicile there, was not liable to be sued as trustee of a citizen of Maine, in the courts of Massachusetts, under the trustee attachment process, notwithstanding his business in the coasting trade compelled him to pass about half his time in Massachusetts.

Peters *v.* Rogers, 5 Mason (U. S.), 555.

By the custom of London no person could be summoned as trustee or garnishee unless he resided within the jurisdiction of the court.

See cases cited in note 2, p. 815, Am. & Eng. Enc. of Law, second edition.

A State court cannot issue garnishment process against a non-resident temporarily in the State, and if such process is issued the court is without jurisdiction unless it is made to appear that he has in his possession tangible property of the defendant or is bound to pay the defendant money or deliver him property within the State.

Penn. R. R. Co. *v.* Rogers, 52 W. Va., 250; S. C., 62 L. R. A., 178.

In the above case this proposition is discussed from pages 182 to 187, inclusive, in L. R. A. and cases cited to sustain the proposition.

The fact that the garnishee is a non-resident and only temporarily within the State is a jurisdictional question and not personal to the garnishee.

Shinn on Attachment and Garnishment, p. 860, sec. 491, and cases cited.

Rindge *v.* Green, 52 Vermont, 204.

In a personal action brought in a State court against a corporation which is neither incorporated nor does business within the State, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, cannot be recognized as valid by the courts of any other State.

Goldey *v.* Morning News, 156 U. S., 518.

As showing that there must have been collusion between the garnishee Harris and Epstein, and that he did not pay the alleged garnishee judgment under compulsion or execution, but paid it voluntarily, and, further, that the alleged

garnishee judgment could not have been enforced as against Harris, because Harris had left the State of Maryland and returned to his home in North Carolina and had no property within the State of Maryland, I submit the proposition that the mere order of Harris given to wholesale merchants for merchandise and while in possession of the latter did not constitute property, and, further, that after said merchandise had been delivered to the common carrier for shipment from Baltimore to North Carolina the said merchandise could not have been garnisheed in the hands of the common carrier.

Baldwin *v.* Great Northern Ry. Co. (Minn.), 51 L. R. A., 640; 64 L. R. A., 625, cases cited in brief.

Garnishment statutes are strictly construed as against the party resorting to the remedy.

State Bank *v.* Hinton, 1 Dev. Law (12 N. C.), 397.

A garnishee who has paid under an invalid judgment cannot plead the same in bar.

Merriam *v.* Rundlett, 13 Pick. (Mass.), 511, cited in Rood on Garnishment, sec. 208, in note.

If the garnishee can show that the attorney who purported to appear for him had no authority, the appearance so entered will be void. Harris testified in this suit that he did not employ any attorney to represent him in the garnishment proceeding in the Maryland court. (See Record, pages 17 and 47.)

Moore *v.* Wayne Circuit Judge, 55 Mich., 84.

Pettit *v.* Muskegon Booming Co., 74 Mich., 214.

In the record of the Maryland action there is no adjudication that Balk was indebted to Epstein. This adjudication was absolutely essential to give efficacy to the adjudication of the condemnation of the debt from Harris to Balk. It is true that it appears that Epstein "made oath on the five

books of Moses" that Balk was indebted to him, but, as stated, it was further necessary that the court should make an adjudication upon this alleged indebtedness. This was not necessary for the purpose of founding a judgment *in personam* against Balk, but for the purpose of giving the court jurisdiction to issue the garnishment process. This defect is not cured by the admission of Balk in this North Carolina suit that he was indebted to Epstein. The garnishment proceeding cannot be aided by anything occurring subsequently and in another action. This is a jurisdictional defect.

As bearing upon the proposition that the Maryland court could not garnishee a non-resident temporarily within the State, I will refer to a statute and decision in Maryland. The act of the legislature of Maryland of 1868, chapter 471, section 211, provides that "Suits against a foreign corporation, exercising franchises in this State may be brought by a resident of this State, for any cause of action; and by a plaintiff not a resident of this State, when the cause of action has arisen, or the subject of the action shall be situated in this State." In considering the above statute, it was held that a citizen of Maryland could not sue a non-resident and garnishee a foreign corporation doing business in Maryland when the cause of action or contract of insurance was not consummated in Maryland.

Myer *v.* Insurance Co., 40 Md., 595.
Cromwell *v.* Insurance Co., 49 Md., 366.

The plaintiff in error appears to rely with confidence upon the opinion of the court in Chicago, &c., Ry. *v.* Sturm, 174 U. S., 710.

In that case this court expressly refrained from holding that a garnishment process against a non-resident temporarily in the State was valid and gave the court jurisdiction.

The court quotes from Andrews' case (the custom of London), as follows:

"For it was always the custom in London to attach debts * * * if the goldsmith who gave the note on the person to whom the bill is directed, *liveth within the city*, without any respect had to the place where the debt was contracted."

The court further say that the essential service of foreign attachment is to reach the *res*, and to do it one must go to the domicile of his debtor. Again, the court say, "the plaintiff in error was not temporarily in Iowa," but that it was an incorporation of such State, and therefore domiciled in the State. The proposition that a State court is without jurisdiction to issue garnishment process against a non-resident temporarily in the State, unless he has in his possession property of the defendant or is bound to pay the defendant money or deliver him property within the State, and, further, that the case of Chicago, &c., Ry. *vs.* Sturm, *supra*, does not hold to the contrary, is most ably discussed and upheld in Penn. R. R. Co. *vs.* Rogers (W. Va.), *supra*.

This court has never held, so far as I am aware, that a State court had jurisdiction to issue garnishment process against a non-resident, and the uniform decisions in a majority of the States in which the question has been presented have been to the effect that State courts were without such jurisdiction, and that it was a jurisdictional defect which could not be waived by the garnishee and had no binding effect upon the rights of the non-resident creditor. Even if the Maryland court has held to the contrary in the case of Savin *v.* Bond, as cited in the brief of plaintiff in error (p. 20) such decision has no binding effect upon this court, and only this court has authority to declare the law as to the limit of jurisdiction of State courts in suits against non-residents and to define the faith and credit which they shall receive in the courts of other States.

If the plaintiff in error has paid Epstein under a void judgment of the court of Maryland he cannot be heard to complain because he shall be compelled again to pay this debt to his rightful creditor, Balk, and doubtless the same

kind and generous hand of Epstein will continue to be extended to the plaintiff in error, and thereby save him from the loss of double payment.

In conclusion, the defendant in error submits that the Maryland court was without jurisdiction and that its process of garnishment and attempted condemnation of the *res* was void, and that the alleged judgment was not entitled to faith and credit by the courts of North Carolina.

JNO. H. SMALL,
Attorney for B. Balk, Defendant in Error.